MAR 2 1 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1554

SUPER TIRE ENGINEERING COMPANY; SUPERCAP CORPORATION; AND A. ROBERT SCHAEVITZ,

Petitioners,

vs.

LLOYD W. McCORKLE, COMMISSIONER OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY; IRVING J. ENGELMAN, DIRECTOR OF THE DIVISION OF PUBLIC WELFARE OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY; FRED L. STRENG, DIRECTOR OF THE CAMDEN COUNTY, NEW JERSEY WELFARE BOARD; JUANITA E. DICKS, WELFARE DIRECTOR OF THE MUNICIPAL WELFARE DEPARTMENT OF THE CITY OF CAMDEN, NEW JERSEY; INTERVENOR DEFENDANT: TEAMSTERS LOCAL UNION NO. 676, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

and

SUPPLEMENTAL BRIEF FOR PETITIONERS

HERBERT G. KEENE, JR.
JAMES A. YOUNG
1300 Two Girard Plaza
Philadelphia, Pennsylvania 19102
LAWRENCE M. COHEN
JEFFREY S. GOLDMAN
111 West Washington Street
Chicago, Illinois 60602
Attorneys for Petitioners

Of Counsel:
STRADLEY, RONON, STEVENS & YOUNG
1300 Two Girard Plaza
Philadelphia, Pennsylvania 19102
LEDERER, FOX AND GROVE
111 West Washington Street
Chicago, Illinois 60602

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 72-1554

SUPER TIRE ENGINEERING COMPANY: SUPERCAP CORPORATION; AND A. ROBERT SCHAEVITZ,

Petitioners,

vs.

LLOYD W. McCORKLE, COMMISSIONER OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY; IRVING J. ENGELMAN, DIRECTOR OF THE DIVISION OF PUBLIC WELFARE OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY; FRED L. STRENG, DIRECTOR OF THE CAMDEN COUNTY, NEW JERSEY WELFARE BOARD; JUANITA E. DICKS, WELFARE DIRECTOR OF THE MUNICIPAL WELFARE DEPARTMENT OF THE CITY OF CAMDEN, NEW JERSEY; INTERVENOR DEFENDANT: TEAMSTERS LOCAL UNION NO. 676, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF.

The Petitioner, Super Tire Engineering Company, respectfully requests leave to file a supplemental brief and, in support thereof, states:

During oral argument the Court specifically requested Petitioner's Counsel to supply it with authorities on whether this

Court may, should it find the instant case not moot, address the underlying substantive question, i.e., whether the special availability of state welfare benefits to strikers with a federal right to a job, improperly intrudes into the federal scheme of collective bargaining. In addition, several procedural and substantive questions arose during oral argument which neither side had previously addressed in their briefs. For the limited purposes of providing the authorities requested and responding briefly to these new points, Petitioner requests leave to file a supplemental brief.

Respectfully submitted,

HERBERT G. KEENE, JR.
JAMES A. YOUNG
1300 Two Girard Plaza
Philadelphia, Pennsylvania 19102

LAWRENCE M. COHEN
JEFFREY S. GOLDMAN
111 West Washington Street
Chicago, Illinois 60602

Attorneys for Petitioners

Of Counsel:
STRADLEY, RONON, STEVENS & YOUNG
1300 Two Girard Plaza
Philadelphia, Pennsylvania 19102

LEDERER, FOX AND GROVE
111 West Washington Street
Chicago, Illinois 60602

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 72-1554

SUPER TIRE ENGINEERING COMPANY; SUPERCAP CORPORATION; AND A. ROBERT SCHAEVITZ,

Petitioners,

vs.

LLOYD W. McCORKLE, COMMISSIONER OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY; IRVING J. ENGELMAN, DIRECTOR OF THE DIVISION OF PUBLIC WELFARE OF THE DEPARTMENT OF INSTITUTIONS AND AGENCIES OF THE STATE OF NEW JERSEY; FRED L. STRENG, DIRECTOR OF THE CAMDEN COUNTY, NEW JERSEY WELFARE BOARD; JUANITA E. DICKS, WELFARE DIRECTOR OF THE MUNICIPAL WELFARE DEPARTMENT OF THE CITY OF CAMDEN, NEW JERSEY; INTERVENOR DEFENDANT: TEAMSTERS LOCAL UNION NO. 676, AFFILIATED WITH INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

SUPPLEMENTAL BRIEF FOR PETITIONERS

This supplemental brief is submitted to respond more fully to certain matters raised by the Court during oral argument:

1. Various members of the Court inquired of Petitioners' counsel as to the authority for this Court to consider the merits

of the instant case[1] should it decide that the Court of Appeals erred in dismissing the matter as moot.[2] There is ample such authority; where, as here, issues are "fully presented by the petition for certiorari" (*Ecker* v. *Western Pactific R. Corp.*, 318 U. S. 448, 489 (1943) and "fully argued both here and [below]" (*Dandridge* v. *Williams*, 397 U. S. 471, 475-6, n. 6 (1969)), this Court has resolved questions not reached by courts of appeals. Indeed, this Court has even decided issues "not considered by the court below" where there was no argument of such issues. *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 567-8 (1931). A similar determination, in the event the Court decides that the present case is not moot, is particularly apropos here "inasmuch as counsel have united in presenting . . . all questions thought to arise upon the record and the litigation has covered a considerable period."[3] *Cole* v. *Ralph*, 252 U. S. 286, 290 (1920). In addition, the merits of this case raise "only issues of law not calling for examination or appraisal of evidence" (*Kiefer-Stewart Co.* v. *Seagram & Sons*,

1. That issue, which was resolved by the District Court but not reached by the Court of Appeals, is whether the payment of state welfare benefits to strikers constitutes an unconstitutional impediment to the enforcement of federal labor policy.

2. Mr. Justice Rehnquist inquired during argument as to whether *Moore* v. *Ogilvie*, 394 U. S. 814 (1969), can be distinguished from the instant situation since there the case assertedly became moot only after it was before this Court while the alleged mootness in this case occurred at the time of the District Court's decision. This distinction, however, is not determinative. See, *e.g.*, *Dunn* v. *Blumstein*, 405 U. S. 330 (1972), involving a *Moore* issue, and *Roe* v. *Wade*, 410 U. S. 113 (1973), where in each instance the alleged mootness occurred *before* decision by either the District Court or Court of Appeals.

3. The complaint was filed in this matter on June 10, 1971 and, following the District Court's order of dismissal of July 13, 1971, presented to the court below on July 17, 1971. The decision of the Court of Appeals, however, did not issue until November 22, 1972. App., pp. 1-7. Moreover, the New Jersey officials who are the principal respondents have never urged that the case be dismissed as moot but, in conjunction with petitioners, have pressed for a resolution of the significant substantive issue here presented.

340 U. S. 211, 214 (1951)) which are now in a proper posture for consideration. Accordingly, it is again urged that, if the Court determines this case not to be moot, it resolve the merits of this dispute or, at the least, provide necessary guidance for the lower courts for the resolution of such questions.

2. During oral argument, inquiry was also made as to the applicability, although it had not been urged by any party, of the abstention doctrine in the event of reversal. That doctrine—which is a matter of judicial discretion when "special circumstances" are present (*Baggett* v. *Bullit*, 377 U. S. 360, 375 (1964)) and an "extraordinary and narrow exception" to adjudication of proper controversies (*County of Allegheny* v. *Frank Mashuda Corp.*, 360 U. S. 185 (1959)—is inapplicable to this case. The New Jersey statute and regulations at issue here are not ambiguous. Indeed, since at least 1957, Respondents have uniformly interpreted the state law so as to permit the payment of welfare benefits to strikers (App., pp. 129-132)—a policy that, significantly, was not altered when New Jersey enacted a new public assistance program in 1971. See Petitioners' reply brief, pp. 5-6. There is surely little likelihood that the state courts will now arrive at a different construction. Coupled with the irreparable nature of the alleged injury (See Petitioner's principal br., p. 13 and p. 15, n. 14), the long standing course of state conduct falls outside the "special circumstances" prerequisite to the abstention doctrine, particularly in view of the lengthy history of this litigation. (See n. 3, *supra*). Cf. *Griffin* v. *School Board*, 377 U. S. 218 (1964); and *Stephens* v. *Yeomans*, 327 F. Supp. 1182 (D. N. J. 1970).

3. The merits of this case depend on whether, in permitting strikers to receive a substantial state subsidy[4] that is denied to

4. Mr. Justice Brennan inquired during oral argument as to the amount of the benefits here at issue. Although no exact evidence on this issue is present in the record, New Jersey has typically been one of the more generous states in granting welfare assistance (see, *e.g.*, Thieblot and Cowin, *Welfare and Strikes: The Use of*

other persons who refuse to accept available employment, New Jersey has thereby weighed "the same competing interests of employers, employees, laboring unions, and the public among which Congress struck a balance in establishing a national legal framework for the conduct of organizational activity, collective bargaining, and labor disputes." Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1365 (1972). The answer to this question must be in the affirmative.[5] New Jersey has created, based solely on its view of "the right of the individual to participate in a bona fide labor dispute" (App., p. 130), one rule for those engaged in a "lawful strike" and another rule for all other welfare recipients who decline available employment. Clearly, in formulating this distinction, the state has necessarily weighed the same interests as Congress did when it enacted a national labor law.[6] Since the state policy cannot be justified under either federal welfare or labor law,[7] the

Public Funds to Support Strikes, Industrial Research Unit, University of Pennsylvania Press (1972), p. 247, Table A-5, and, generally, strikers have received through public assistance 80-90% or more of their working income with payments in the area of $300-350 per month commonplace. *Id.* at 100-101, 142, 148, 199-200.

5. This Court's summary affirmance in *Francis* v. *Davidson*, 340 F. Supp. 351 (D. Md. 1972), aff'd 409 U. S. 904 (1972), which raised only the question of construction of the then applicable H. E. W. regulations (see Petitioners' reply brief, p. 11), did not answer this issue. In fact, following H. E. W.'s revision of its regulations consistent with *Francis* (App. pp. 123-125), the injunction in that case has, upon petition of Respondent State of Maryland, been dissolved.

6. Mr. Justice White asked during oral argument as to whether this reasoning would also preclude state welfare subsidies to individuals who are locked out by their employer. Again, since such persons continue to be "employees" under federal labor law, the answer must be in the affirmative. The state, as in the case of strikers, would simply be enforcing, by treating in the absence of a specific factual determination, locked-out employees as non-employees, its own conception of the appropriate balance between the competing interests in the area of labor relations. That balance, however, must be struck by Congress, not the states.

7. Respondents during oral argument defended the special treatment afforded strikers by arguing that the denial of benefits to

New Jersey policy of granting public assistance to strikers must be found to be constitutionally impermissible.

Respectfully submitted,

HERBERT G. KEENE, JR.
JAMES A. YOUNG
1300 Two Girard Plaza
Philadelphia, Pennsylvania 19102

LAWRENCE M. COHEN
JEFFREY S. GOLDMAN
111 West Washington Street
Chicago, Illinois 60602

Attorneys for Petitioners

Of Counsel:
STRADLEY, RONON, STEVENS & YOUNG
1300 Two Girard Plaza
Philadelphia, Pennsylvania 19102

LEDERER, FOX AND GROVE
111 West Washington Street
Chicago, Illinois 60602

---

strikers would improperly discourage activities sanctioned by federal and state law. Such an effect is clearly not improper. See *Butcher* v. *Florida Industrial Comm.*, 231 So. 2d 47 (Fla. 1970); and *Russo* v. *Kirby*, 453 F. 2d 548 (2nd Cir. 1971). The state, to preserve the balance struck by Congress, must maintain the *status quo ante bellum*. Indeed, as Mr. Justice Powell noted during oral argument, insofar as it has arbitrarily selected certain strikers for exemption while disregarding others, its actions raise serious equal protection concerns. Cf., *e.g.*, *Shapiro* v. *Thompson*, 394 U. S. 618, 641 (1969).